Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DAVID JONES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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62pp

QUESTIONS PRESENTED

Can the District Court be permitted to instruct the jury, in a case where there are two or more means of committing an offense, in such a way that the jury could convict the defendant if part of the jury believed that the offense was committed by one means and the rest of the jury by another?

Can the Government convict a defendant of an offense against the laws of the United States without introducing any evidence that the person on trial was, in fact, the same person who was named in the indictment?

Can the Court of Appeals permit the District Court to ignore the structure of the Medicare regulations and the mechanism that they establish to withhold and recover improperly claimed funds and allow it to impose a sentence of imprisonment and restitution based on of amounts of money that the government never paid, either has or will recover and that includes funds that were not wrongfully claimed?

PARTIES TO THE PROCEEDINGS

The United States Of America

David Jones

Tom Henry

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THE OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, affirming Petitioner's conviction held, in pertinent part, that:

(1) The District Court need not instruct the jury, in a case where an offense may be committed by separate and distinct acts, that in order to convict, all jurors must agree on the same distinct act or acts by which they found that the petitioner committed the offense;

(2) By not writing on the point raised in the District Court and Court of Appeals, it was not necessary for the government to present evidence identifying the Petitioner as the person indicted.

(3) The Court may use, as punishment and restitution loss amounts, money which Petitioner was legally entitled to claim and additional amounts that the government has never paid, already retained and will or has recovered through the Medicare audit and withholding process.

The *United States v. David Jones*, No. 92-6650, unpublished, a copy of the opinion reproduced as Appendix A. The judgment of the District Court is reproduced in Appendix B.

JURISDICTION

The United States District Court for the Middle District of Tennessee entered its judgment of conviction of Petitioner on November 23, 1992. Petitioner filed Notice of Appeal to the United States Court of Appeals for the Sixth Circuit on December 1, 1992.

The Court of Appeals rendered its decision affirming Petitioner's conviction on November 29, 1993. A Motion for Rehearing was filed with the Court of Appeals on December 13, 1993 and was denied on January 7, 1994. This Petition for Certiorari was filed with the clerk of this court within ninety days of the Court of Appeals' Order Denying Rehearing and is timely. Supreme Court Rule 13.1.

This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS

The questions presented involve the due process clause of the Fifth Amendment to the Constitution of the United States and the right to trial by jury in the Sixth Amendment of the Constitution of the United States, which amendments in their entirety read as follows:

Amendment V. Grand Jury Indictment for Capital Crimes

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, or be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI. - Jury Trial for Crimes, and Procedural Rights

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATUTES AND REGULATIONS INVOLVED

The questions presented also involve the proper interpretation and application of the following Statutes and Regulations of the United States:

18 U.S.C. 3663 **Order of restitution**

***

(e)(1) "The Court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation, except that the court may, in the interest of justice, order restitution to any person who has compensated the victim for such loss to the extent that such person paid the compensation. An order of restitution shall require that all restitution to victims under such order be made before any restitution to any other person under such order is made."

U.S.S.G. § 2F1.1 **Fraud and Deceit**

***

(7)(b) "*Fraudulent Loan Application and Contract Procurement Cases*. In fraudulent loan application cases and contract procurement cases where the defendant's capabilities are fraudulently represented, the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss). For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered, or can expect to recover, from any assets pledged to secure the loan."

42 C.F.R. 413.17 **Cost to related organizations**

(a) Principle "Except as provided in paragraph (d) of this section, costs applicable to services, facilities, and supplies furnished to the provider by organizations related to the provider by common ownership or control are includable in the allowable cost of the provider at the cost to the related organization. However, such cost must not exceed the price of comparable services, facilities, or supplies that could be purchased elsewhere."

STATEMENT OF THE CASE

Petitioner, David Wayne Jones ("Jones"), was indicted on May 7, 1991. Later a superseding indictment was returned on February 20, 1992. Jones was charged in nine counts, including two counts of defrauding the United States under 18 U.S.C. 371; four counts of making a false statement under 18 U.S.C. 1001; two counts of impeding a federal auditor under 18 U.S.C. 1516 and one count of submitting a false claim to the United States under 18 U.S.C. 287. Jones plead not guilty and was convicted by a jury on all but the last count.

On November 23, 1992, Jones was sentenced to a term of fifty-one months imprisonment, and ordered to pay restitution in the amount of $2,460,950.02 The restitution and a thirteen point enhancement of his sentence was based on the District Court's finding that the Jones caused an unrecovered loss to the government of $2,460,950.02.

Jones timely perfected his appeal to the United States Court of Appeals for the Sixth Circuit, which had jurisdiction pursuant to 28 U.S.C 1291. On November 29, 1993 the Sixth Circuit affirmed Jones' conviction and sentence. A

timely Motion for Rehearing was filed in the Sixth Circuit on December 13, 1993. It was overruled on January 7, 1994.

THE EVIDENCE

Jones is a 34 year old, 1980 graduate of Middle Tennessee State University with a degree in business administration (David Jones Presentence Investigation Report Prepared August 17, 1992 p. 13). He entered into an accounting and tax service partnership known as Thompson & Jones in 1984 where he primarily prepared tax returns and kept books of various non-health care related clients (R. 303, David Jones' Sentencing Memorandum p. 9). The firm also acted as the outside bookkeeper for the home health agencies owned by Tom Henry beginning in 1984 (Banks XXXIII Tr. 2318-2319; Emberton XXIX Tr. 1692-1694).

The superseding indictment and trial dealt with events that occurred during 1987 through 1990 (R. 181, Superseding Indictment pp. 21-19). Thompson & Jones only performed general accounting and tax work for the home health agencies (Miller IX Tr. 209) and did not deal with Medicare intermediaries. *Id.*

At trial, the government alleged that Datom International, Inc., Datom Business Services, Inc., K M & M Leasing, Inc., Argus Medical Supplies, Inc., PHR and First Tennessee Medical Supplies, Inc. were related to the home health agencies (Goggin XXXVIII Tr. 2848, 2858-2859, 2873-2875).

Co-defendants Tom Henry ("Henry") and John Greer, Jr. ("Greer") operated several home health agencies and companies which owned and rented equipment to them (Greer, Jr. XXII Tr. 1167-1168). Jones did not own or operate any of these agencies, except Datom Business Services, Inc. ("Datom Services").

Jones entered into a business partnership with co-defendant Henry on January 1, 1989 (Dillard VI Tr. 9-15), forming Datom International, Inc. ("Datom International"), a management company and Datom Services, a bookkeeping and tax service, (Miller IX Tr. 9, 14, 29, 61, 62). Henry ran Datom International while Jones ran Datom Services *Id.* Beginning in 1989, Datom Services provided the financial record keeping and tax reporting for the home health agencies involved (Miller IX Tr. 20).

After Greer purchased Datom International, it was engaged to manage seven agencies (Greer, Jr., XXII Tr. 1178). Greer entered into contracts for Datom International to manage the various home health agencies (Greer, Jr., XXII Tr. 1285).

K M & M Leasing, Inc. was a company started by John Greer, Sr., in 1988 to lease automobiles, furniture, computers and telephone equipment (Greer, Sr. XXVII Tr. 1329). K M & M leased automobiles and other equipment to the home health agencies (Greer, Sr. XXVII Tr. 1333, 1338, 1342-1345). After Greer purchased the home health agencies from Tom Henry, Henry suggested that Datom International should own K M & M instead of John Greer, Sr. (Greer, Sr. XXVII Tr. 1355). K M & M was sold to Datom International in January of 1989. (Greer, Sr. XXVII Tr. 1382).

Argus Medical Supplies was a medical supply company started by Sidney Ford in November 1987 (Ford XVI Tr. 329). Argus sold medical supplies to Mid-Cumberland Home Health Agency, First Tennessee, Doctors Home Health Agency, Southwest Home Health Agency, Northwest Home Health Agency and South Central Home Health Agency when they were owned by Tom Henry (Ford XVI Tr. 330).

Four of Jones' convictions are predicated on false statements (non-disclosure of related party transactions) in the cost reports filed in 1989 by various home health agencies (R. 1881, Superseding Indictment pp. 17, 18, 19, 10, 13). There was no evidence at trial that David Jones prepared any of the cost reports in issue. Jackie Dillard testified that the cost reports were prepared by Stan Smith, Gary Jackson, Dan Miller and Gary Bowers (Dillard VI Tr. 40-41). Charles Banks testified that the cost reports were prepared by consultants (Banks XXXIII Tr. 2323). The cost reports were prepared by experts who specialized in the field of Medicare regulations. (Miller IX Tr. 22, 166).

Every government witness that testified at trial regarding related parties agreed that related parties were to be lawfully paid on the basis of their actual cost (Griffin I Tr. 34; Wheeler I Tr. 131; Newsom XIII Tr. 146-147). There were no allegations during trial or at sentencing that any related party failed to provide goods and services to the home health agencies. The Datom companies provided management and accounting services (Miller IX Tr. 9-10, 15). Argus provided medical supplies. (Ford XVI Tr. 335-336). K M & M leased cars and business equipment to the home health agencies. (Greer, Sr. XXVII Tr. 1329-1333, 1342-1344).

The bulk of the testimony relating to David Jones during the trial only established that he was an accountant for Thompson & Jones and later for Datom Business Services which maintained the books for the home health agencies owned by Henry and later Greer. (Caldwell III Tr. 16, 82; Dillard VI Tr. 9-15, 39-40; Wallace X Tr. 5-6; Stanton XII Tr. 52-54; Emberton XXIX Tr. 1692-1698; Banks XXXIII Tr. 2318-2319).

At sentencing, the trial court started with base offense level six under U.S.S.G. § 2F1.1(a). (R 315, Judgment in Criminal Case pp. 1-4), and adopted the Government's loss calculation and increased the total offense level by 13 levels under U.S.S.G. § 2F1.1(b)(1)(N), based on what it perceived to be a loss by Medicare of more than $2,500,000.00 (Court XXIII S.Tr. 230).

The Jones related loss to Medicare was based on the concealment of the related party transactions (Rhodes XXIII S.Tr. 16, 19, 31, 35, 40). Each government witness who testified at trial on the subject matter of related party transactions agreed that related party transactions were permissible under Medicare regulations. (Griffin I Tr. 34; Wheeler I Tr. 108; Newson XIII Tr. 146-147; Rhodes XXIII S.Tr. 68). Every government auditor/accountant/certified public accountant witness at trial agreed that related party transactions are allowable Medicare expenses to be paid to the provider at the cost to the related organization (Griffin I Tr. 34; Wheeler I Tr. 131; Newson XIII Tr. 146-147).

The only government witness, Rhodes, called in support of the Government's loss figure, testified that he was unable to identify the actual cost of any of the six related parties which formed the basis of Counts 1, 3, 18, 21, 24, and 29 (Rhodes XXIII S.Tr. 68, 70, 74, 75, 77, 85, 86). Agent Rhodes further testified that he was unable to give "the actual cost of any year listed in the indictment" (Rhodes XXIII S.Tr. 86).

Rhodes did not deduct monies which Medicare withheld from the home health agencies for audit adjustment factors from 1987 through 1990 (Rhodes XXIII S.Tr. 95). Bessie Wheeler of Blue Cross Blue Shield of South Carolina testified that she was aware of withholding of payments from the providers but was unaware of the amount (Wheeler I Tr.

135). John Singer, a certified public accountant specializing in Medicare accounting, testified that there was no loss to Medicare (Singer XXIII S.Tr. 126-127). The Government's calculations did not comply with Medicare regulations and were inaccurate (Singer XXIII S.Tr. 131). Singer testified that Medicare owed David Jones through his related companies, $644,655.000 even if the charges were correct (Singer XXIII S.Tr. 126-127).

Charles Friddell, an attorney and certified public accountant for the new owners of the home health agencies, whose alleged relationships form the basis of the indictment, testified that Medicare had retained or recovered $4.5 to $5 million from the home health agencies for the related party transactions underlying the convictions (Friddell XXIII S.Tr. 167). Medicare made audit adjustments for years 1988, 1989 and 1990 which brought the amount recovered or recouped by Medicare to approximately $5.6 million (Friddell XXIII S.Tr. 166.).

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Sixth Circuit has decided two issues of federal constitutional law of significant importance in violation of this Defendant's constitutional rights, as follows:

> (1) By affirming a jury verdict of guilty rendered under instructions which permitted the jury to convict without unanimously agreeing on the specific conduct by which the Petitioner violated the law, it denied the Petitioner his right to a trial by jury under the Sixth Amendment to the Constitution to the United States.

(2) By affirming the District Court's conviction when no evidence was presented on by the government on an essential element of the offense, that is, that the accused was in fact the person who was indicted, it denied the Petitioner his right under the Fifth Amendment to the Constitution of the United States to a presumption of innocence unless and until the government proved each element of the case beyond a reasonable doubt.

In addition, the Court of Appeals affirmed an illegal sentence that was improperly imposed because the District Court found government losses of money which, under applicable Medicare regulations and procedures, the government did not lose or would recover and which the Petitioner could not have, as a matter of law, intended to wrongfully claim and thereby:

(1) Misapplied the sentencing guidelines by imposing an improper thirteen point enhancement of the level of the offenses charged; and,

(2) Violated 18 U.S.C. 3663(e)(1) by imposing restitution for amounts that would be repaid to the government by a third party.

The errors committed by the Court of Appeals violate important, substantive constitutional rights of the Petitioner and misapply important statutory and regulatory provisions of federal law. If allowed to stand, the rules approved here will seriously impair important rights of persons accused of criminal violations arising out of the massive and growing health care programs of the Federal Government.

ARGUMENT AND AUTHORITIES

A. THE DISTRICT COURT'S INSTRUCTIONS PERMITTED THE JURY TO CONVICT WITHOUT REACHING A UNANIMOUS VERDICT

The Sixth Amendment to the Constitution of the United States requires unanimous jury verdicts. In criminal cases, this requirement extends to all issues, such as the character or degree of the crime, guilt, and in instances where the jury is involved, punishment. *Andres v. United States*, 333 U.S. 740, 68 S.Ct. 880, 1992 L.Ed.2d 1055 (1948). In this context, unanimity means more than a mere conclusory agreement that the defendant has violated the statute in question. There must be substantial agreement by *all* jurors on the principle factual elements underlying the specified offense or offenses. *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977).

Before this case was submitted to the jury, the defense counsel jointly requested that the court give unanimity instruction as follows:

> "With regard to Counts 17, 18, 20, 21, 23, 24, 25, 28, and 29 which charge that some of the Defendants knowingly and willfully submitted cost reports that falsely stated that there were no 'related party' transactions in a given year, you are further instructed that in order to return a verdict of guilty as to any of these counts you must unanimously agree upon which parties were 'related' within the meaning of the Medicare regulations, if any, in the year alleged. If you cannot agree in that manner as to any of these counts, you

must find the Defendant(s) not guilty of that count."

Later, the following instruction was also requested:

> "With regard to the alleged false statement charge contained in Count Fourteen of the Indictment, which gave rise to your question on Friday afternoon, that count charges that the Defendant Tom Henry 'knowingly and willfully made or used a false document knowing that the document contained false and fictitious statements and entries in that Tom Henry submitted a cost report to Medicare for the year 1987 for Tennessee Health Services, Inc., which cost report stated that $370,590 was expended in reimbursable costs when in truth and fact as Tom Henry then and there well knew all costs listed on the cost report were not reimbursable.' As I instructed you Friday afternoon, with regard to your consideration of this count, you need not find that the total amount of money claimed on the cost report as reimbursable costs was false. However, in order to return a verdict of guilty as to this count, you must unanimously agree upon **which** costs, if any, were not reimbursable. If you cannot agree in that manner, you must find the Defendant not guilty. This additional instruction, which is in further response to your question, shall also apply to your consideration of Counts 15, 16, 19, 22, 26, and 27 which also charge false statements in regard to reimbursable cost stated on cost reports.

The requested instructions were denied and in their place the District Court gave the following general instruction:

> "In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous."

The core of the charges against Petitioner was that he was knowingly involved in claims for reimbursement of profits of related entities in a Medicare program, or a conspiracy to do so. These questions involved complex fact issues about the relationships between several entities, some of which involved the Petitioner and some of which did not, as reflected in the discussion of the evidence, *supra*.

In addition, there were a complex series of cost reports, dealing with numerous transactions and expenses by all of the several entities. Further, Counts 18, 21, 24 and 29 alleged, in the disjunctive, that the Defendant either made or used false documents. Under the language of the indictment, the defendant could be guilty if he committed either or both acts.

There was conflicting evidence in the record on all of these issues. Individual jurors could have reached different conclusions from one another on any one or more of the numerous and complex questions that they had to decide. For example, they might have disagreed on whether some of the costs were recoverable under the Medicare regulations, the nature of the relationships of one or more of the entities to each other and whether the defendant did or did not commit specific acts charged under the various counts.

Under these circumstances, there easily could have been no unanimity within the meaning of *Andres v. United*

States, supra, and as required by the Fifth, Ninth and Third Circuits. See *United States v. Gipson, supra; United States v. Jessee*, 605 F.2d 430 (9th Cir. 1979); *Bisno v. United States*, 299 F.2d 711 (9th Cir. 1961), *cert. denied* 370 U.S. 952 82 S.Ct. 1602, 8 L.Ed.818 (1962), *reh'g denied*, 371 U.S. 855, 85 S.Ct. 51, 9 L.Ed.2d 94 (1962).

The opinion of the court of appeals simply stated that it was sufficient if the court gave overall instructions which indicated that unanimity was required. An analysis of the instruction actually given reveals that there was no prohibition from returning a verdict of guilty in the event that all of the jurors did not agree on the specific facts which they found with respect to the relationship of the companies, the costs for which reimbursement was claimed or acts they thought the petitioner had committed.

Under these facts, real and substantial harm was done to the petitioner by permitting the jurors to find guilt without making the type of analysis necessary in order to determine, and all agree, on what facts they based the conviction. The Sixth Circuit's rule in this case, permitting the type of instructions given in a matter of this complexity, deprives defendant of his right to a unanimous verdict on all the fact issues. For this reason, the conviction should be set aside.

B. THE FAILURE OF THE GOVERNMENT TO OFFER PROOF OF DEFENDANT'S IDENTITY

The Fifth Amendment to the Constitution of the United States clothes criminal defendants with a presumption of innocence and requires that the government prove each and every element of the offense beyond a reasonable doubt. See *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068,25 L.Ed. 2d 368 (1970). *United States v. Carr*, 550 F.2d 1058 (6th

Cir. 1977). The identification of the person charged in the indictment is essential in every criminal offense, and there must be some evidence abduced to satisfy the government's burden of proof. *Butler v. United States*, 317 F.2d 249, 254 (7th Cir. 1963), *cert. denied*, 375 U.S. 838, 84 C.Ct. 77, 11 L.Ed.2d 65 (1963); 20 Am.Jur., *Evidence* § 1222 (1939); 22(a) C.J.S., *Criminal Law* § 616 (1961); 1 Underhill, Criminal Evidence § 127 (5th Ed. 1956); 1 Conrad, *Modern Trial Evidence* § 57 (1956). When the government fails to prove that the person identified by the witnesses' testimony is the same person who is standing trial, the conviction must be reversed. *U.S. v. Metz*, 312 F.2d 199 (6th Cir.), *cert. denied*, 315 U.S. 817, 84 S.Ct. 53, 11 L.Ed.2d 52 (1963).

In this case, the government offered the testimony of ninety-two individual witnesses and thousands of pages of exhibits. Not one of the witnesses called identified Jones, who was in the courtroom, as the person involved in these transactions. None of the documentary evidence in any way connected the individual sitting in the courtroom with the offense. All of the other defendants were specifically identified by the government's witnesses in this case. Mr. Jones whose name is one of the most common in the English language, did not testify, no admissions by him were introduced into evidence and there were multiple defendants on trial.

When this issue was raised before the Court of Appeals, the government relied upon a so called "tacit admission of identity". Clearly, this is inconsistent with the Fifth Amendment privilege against self-incrimination and improperly shifts the burden of proof of an essential element of the case to the defendant. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, *reh'g denied*, 381 U.S. 957, 85 S.Ct. 1797 (1965).

The Court of Appeals did not address this point in its opinion and no opinion, findings or conclusions on this point were filed by the District Court. Rather than face this glaring and flagrant failure by the government to prove an essential element of its case, the Court of Appeals totally ignored this issue.

By following this course of action, the courts below have sanctioned a procedure which deprives the Defendant of two of his most valuable rights under the Fifth Amendment to the Constitution of the United States, his presumption of innocence and the government's burden of proof. Under the tacit holdings of the court below, the government may now convict without carrying its burden of proof on an essential element or, conversely, shift the burden of proof on the element to the defendant. Such a procedure flagrantly violates the rights of a criminal defendant under the Fifth Amendment to the Constitution of the United States to be presumed innocent until proven guilty beyond a reasonable doubt. It should not be allowed to stand.

C. BASING THE PUNISHMENT ON AMOUNTS OF MONEY THAT UNDER THE MEDICARE REGULATIONS THE PETITIONER WAS ENTITLED TO RECEIVE, THE GOVERNMENT RETAINED OR WHICH THE GOVERNMENT WILL RECOVER THROUGH ITS AUDIT AND WITHHOLDING PROCEDURES.

(1) *The Thirteen Point Enhancement*

The transactions involved in this case are claims for reimbursement of expenses advanced by home health care providers. The gravamen of the offenses were that related entities claimed profits of companies related to them as part

of the costs which the government was required to reimburse under the Medicare program. Related entities may do business with each other, but they may only be reimbursed for their costs and may not mark up their merchandise or services to claim profits (42 C.F.R. § 413.17).

The Medicare expense reimbursement system, specified in detail in 42 C.F.R. part 413, is designed to work as follows:

> (1) The provider purchases goods and services from either independent suppliers or suppliers which are related entities. Payment is advanced from the funds of the purchaser, who claims reimbursement from the government either through monthly, interim payments or, at the end of the fiscal year, through the submission of a document known as a cost report. Percentages of the actual costs are always withheld from interim payments and adjusted on the annual cost report.
>
> (2) Amounts paid to independent suppliers are reimbursed in full. However, only the actual cost that related entity suppliers incurred may be claimed. A knowing attempt, successful or not, to wrongfully claim related parties' profits may be an offense under the several criminal statutes involved here.
>
> (3) The Medicare program is administered by "intermediaries" who are normally local health insurance carriers operating under contracts with the government.

(4) The cost reports are periodically audited to determine if the payments are correct. Any incorrect or wrongful payment that is identified is charged against amounts to which the provider is entitled. At any given time, the government is indebted to the provider and holds funds on its behalf. These funds stand as *de facto* security for any amounts owed back to the government for earlier incorrect or improper payments.

(5) The audits are conducted either by the government's Health and Human Service personnel or by intermediary representatives. If any substantial irregularity is discovered, either the government personnel or the representatives of the intermediary can place a hold on all reimbursements due the provider. (See The Evidence, page 8 through 10 of this petition, *supra*).

The District Court and the Court of Appeals had the following facts before them that require reversal of this case. These facts are:

(1) The audits, subject to government imposed holds, were ongoing at the time of sentencing.

(2) The government was withholding funds owned to Jones' company, Datom Services and other companies, which more than offset the losses calculated by the government.

(3) The governments' calculations did not subtract the costs of the related entities selling

> the goods and services and did not bear any rational relationship to the economic realities of the facts in this case. (See The Evidence, page 8 through 10 of this petition, *supra*)

The Court of Appeals sanctioned the District Court's increase of the offense by thirteen levels based upon speculation of losses that included amounts that Datom Services and the other entities were legally entitled to receive. This was error because the costs of the goods and services purchased by Datom and the other entities were admittedly not deducted from the government's speculative figure. 42 C.F.R. 413.17. Since the amounts of the costs were legally recoverable, Jones could not, *as a matter of law*, have intended to falsely claim them on behalf of Datom or any other entity. In view of the uncontradicted testimony that the government would recover all of the improper payments, there would be no actual loss.

The Fraud Guidelines, U.S.S.G. § 2F1.1 § 7(b), require loss to be determined by deducting what was recovered or can be expected to be recovered from the total amount involved, and do not allow enhancement on the basis of amounts to which the defendant was legally entitled *United States v. Kopp*, 951 F.2d 521 (3d Cir. 1991) *reh'g denied*. At sentencing, the court enhanced the level of the offense by thirteen levels based upon testimony only of the *gross* amounts received by Datom Services and the other entities. In its opinion, the Court of Appeals sanctioned this procedure.

This point is especially important because this issue will arise repeatedly in criminal proceedings generated by ongoing and probably expanded federal medical programs. The danger of applying the gross amount test used by the District Court and the Court of Appeals in this case is an

impermissible, gross exaggeration of the seriousness of the offense. This is because in these transactions large amounts of money normally are advanced and reimbursed. Unless the actual amounts of the improper payments are isolated from legitimate claims, the enhancement will be increased out of all proportion to the actual scale of the criminal activity.

The loss calculation must bear some relationship to economic reality. *United States v. Kahn*, 969 F.2d 218, 220 (6th Cir. 1992); *United States v. Schneider*, 930 F.2d 555, 559 (7th Cir. 1991). Fraud guidelines have never endorsed sentencing based on the worst case scenario. The background of U.S.S.G. § 2B.1.1 emphasizes that "loss" measures both the harm to the victim and the gain to the defendant of various types of losses. *United States v. Kahn*, 969 F.2d. 218, 220, *supra*. In its analysis, In *United States v. Kopp, supra* the Third Circuit adopted the reasoning of the Seventh Circuit that "All thefts involved in intent to deprive the victim of the value of property taken. The same is not always true of fraud." It went on to note that mechanical application of the theft guideline in fraud cases would frustrate the legislative purpose of the guidelines and contravene the specific intent of the commission.

The opinion below treated this question as essentially one of fact finding by the District Court. It ignored its obligation to review the interpretation of guidelines and the related statutes and their application de novo, *U.S. v. Phillip*, 948 F.2d 241 (6th Cir. 1991), *cert. denied*, 112 S.Ct. 1984, 118 L.Ed 590, 60 U.S.L.W. 3781 (1992). The evidence reflected in the record both at trial and at sentencing establishes that the government will not, in fact, lose anything. So far as we have been able to ascertain, this court has not ruled on the question of the sentencing guidelines application to determining "losses" in cases involving claims made under Medicare regulations and

procedures. Guidance on this issue would enhance the administration of criminal justice in this area of the law.

(2) *Imposition of restitution where the victim recovers its losses*

The language of 18 U.S.C. 3663(e) expressly prohibits the District Court from imposing restitution for losses of amounts for which the victim has received, is to receive compensation or in fact has not lost.

The preceding section of this petition discussed the proof that the government was in fact at least in the process of recovering its losses, had probably already done so and the mechanics of recouping such losses. The ongoing audit proceeding, the withholding process and the government's right to deduct amounts improperly paid from those due and owing to Datom Services and the other entities assures this recovery. Further, under the government's own testimony the losses are greatly inflated. Under the undisputed evidence, no allowance was made for the actual cost of the related parties services, but the District Court nevertheless imposed restitution based on a gross figure.

The amount was calculated by a government agent who is not an expert in this area, who admitted that he did not take into consideration factors such as actual cost of the related party services and other vital information. On the other hand, uncontradicted evidence from the knowledgeable witnesses (including some government witnesses during trial) conclusively showed that there were such costs and that the amounts alleged to be improperly claimed will in fact be recovered.

In view of the increasing use of restitution as part of sentencing, and its application to the health care industry,

guidance from this court is important to prevent the type of injustice that has been perpetrated by the District Court and the Court of Appeals in this case.

CONCLUSION

For all of the foregoing reasons, Petitioner David Wayne Jones respectfully suggests that this petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

FILED
NOV 29 1993
LEONARD GREEN, Clerk

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NOT FOR PUBLICATION

No. 92-6650

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT TENNESSEE.
TOM HENRY, DAVID JONES AND JAMES HENRY Defendants-Appellants.	)	

BEFORE: KEITH and KENNEDY, Circuit Judges; and JORDON, District Judge.*

PER CURIAM: Defendants-Appellants, Tom Henry, David Jones and James Henry, appeal their convictions in connection with the theft of Medicare funds. James Henry was convicted of Making False Statements, in violation of 18 U.S.C. §1001. Tom Henry and David Jones were convicted of Conspiring to Defraud the United States, in violation of 18 U.S.C. §371, Obstructing a Federal Audit, in violation of 18 U.S.C. § § 1516 and 2, and Making False Statements, in violation of 18 U.S.C. § §1001 and 2. In addition, Tom Henry was convicted of Theft Concerning Programs Receiving Federal Funds in violation of 18 U.S.C. §666(a)(1)(A), Paying Kickbacks for Referral of Patients in violation of 42 U.S.C. §1320(a)-7(b)(2)(a), and Money Laundering in violation of 18 U.S.C. §§1957 and 2. For the reasons stated below, we **AFFIRM** the convictions and sentences imposed by the district court.

Tom Henry owned and operated Tennessee Health Services, Inc., (THS), which was the home office for numerous Home Health Care Agencies (HHCA) which he also owned, including First Tennessee In-Home Care (FTHHA); Mid-Cumberland Home Health (MCHHA); Doctors Home Health, Inc., (DHHA); South Central Home Health (SCHHA); and South West Home Health, Inc. (SWHHA). Tom's brother, James Henry, was the administrator of SCHHA. Unlike the other HHCAs owned by Tom Henry, SCHHA maintained its own checking accounts, accounts receivable and payroll. Tom Henry controlled the accounts of the other HHCAs from THS.

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* The Honorable Leon Jordan, United States District Court for the Eastern District of Tennessee, sitting by designation.

The HHCAs were licensed by Medicare. Medicare is administered by the U.S. Department of Health and Human Services (HHS). HHS contracts with insurance companies (intermediaries) to distribute Medicare funds. The intermediary pays the Medicare funding to providers of medical care, such as HHCAs. Medicare covers the reasonable cost of direct patient care and overhead expenses incurred.

The HHCAs receive Medicare funds through the intermediary at interim periods during the year based on claims for the preceding year. At the end of the fiscal year, the HHCA submits a cost report to the intermediary summarizing expenses incurred that year for its Medicare patients. The intermediary reviews the cost report and if the actual cost on the report are more than the HHCA received during the year, Medicare pays the difference. If, however, the actual costs incurred by the HHCA for the year are less than the amount advanced by the intermediary, the HHCA must repay Medicare the difference.

The appellants in this case were involved in a number of transactions which enabled them to pilfer Medicare funds. One method of unlawfully receiving Medicare funds was to direct the HHCAs to conduct business transactions with companies which the appellants secretly owned, and seek reimbursement for the profits made. An HHCA may do business with a related party, such as a company that is owned by or controlled by the owner of the HHCA. However, the HHCA may not receive Medicare money for profits made on the goods or services provided by that related party.

The appellants perpetrated this scam a number of times. For example, In 1989, David Jones and Tom Henry formed a management company called Datom International

to manage the HHCAs. In addition, they formed Datom Business Service to perform accounting services for the HHCAs. In order to receive Medicare money for profits made from the management and accounting businesses, Tom Henry purported to sell THS and the HHCAs for $25,000 to John Greer, Jr. In fact, the transaction was a sham; no money changed hands. Tom Henry and David Jones continued to control the agencies.

Also in 1988, Tom Henry and David Jones "bought" Argus Medical Supply (Argus) from Sidney Ford, again for no money. Argus sold medical supplies to the HHCAs owned and operated by Tom Henry, with a markup of at least 65 percent. In addition, Tom Henry was one of the owners of First Tennessee Medical Supplies, Inc. Tom Henry directed employees of his HHCAs to purchase medical equipment from First Tennessee Medical Supplies, Inc. Tom Henry also formed KM & M Leasing Company (K M & M) with John Greer, Sr. KM & M leased vehicles and office furniture to the HHCAs owned by Tom Henry. Tom Henry split KM & M profits with John Greer, Sr.

For each of the cost reports filed for the HHCAs, the appellants indicated that business was conducted with Argus, First Tennessee Medical Supplies, KM & M and profit was charged to Medicare as a cost. Nevertheless, the cost reports falsely stated that there had been no transactions conducted with related parties for the years in question.

In another scheme to illegally receive Medicare funds, Tom Henry paid a number of physicians a monthly fee to refer patients to his HHCAs. In 1988, Henry paid approximately $50,000 to these physicians under the guise of "medical advisors." Henry claimed that amount on the Medicare cost report for that year.

In an additional effort to defraud Medicare funding, in 1989, David Jones and Tom Henry hired Dan Miller, an accountant, to prepare a draft of the 1988 cost reports for the HHCAs. The agencies received money from Medicare during 1988 through interim payments. Miller found that in 1988, Medicare paid the HHCAs approximately $300,000 over the actual reimbursable costs incurred. In order to avoid reimbursing Medicare, David Jones told Miller to falsify the records so that it would appear nothing was owed to Medicare. Accordingly, Miller increased the salary amounts listed in the cost reports of some of the HHCAs for 1988, to make it appear that bonuses were paid to employees.

In 1989, the 1987 costs reports for a number of HHCAs were audited. To hide the fact that these bonuses were never paid, Tom Henry ordered Miller to give the auditors bogus checks and bank statements, including checks that had not cleared the bank and checks that were altered.

After learning that the 1988 cost reports would be audited, Tom Henry told Miller to prepare a list of employees and the amount supposedly paid to them in bonuses to match the amounts stated on the 1988 cost report. Tom Henry also told Miller to prepare notes of financial obligation purporting to reflect bonuses due to the employees, containing the employees' initials or signature. Many employees testified that the initials or signatures on the notes were not their own. In addition, David Jones told Miller to prepare Merit Pay Schedules purporting to show liquidation of the bonus amounts. The schedules were actually a listing of the employees' regular pay checks.

Miller also gave auditors documentation to support mileage expenses for Tom Henry for the THS cost report. According to the documentation, Tom Henry made three

round trips from Lebanon, Tennessee to Johnson City, Tennessee, and one round trip to Memphis, Tennessee, all in one day. Johnson City is approximately 250 miles from Lebanon Tennessee. In addition, Miller claimed on this cost report amounts which were actually used for travel and expenses for Tom Henry and friends for a vacation in Cancun, Mexico.

In April 1990, the 1988 cost reports for FTHHS, SCHHA, DHA, and MCHHA were audited. Under Tom Henry and David Jones' direction, Miller prepared false documentation showing that employees of MCHHA were paid $230,000 in bonuses, employees of DHA $90,500, and employees of SCHHA $12,500. None of these employees were paid this money at this time. In addition Miller noted in the MCHHA cost report that Henry Puckett was paid $40,000 in salary, despite the fact he was not employed by MCHHA. In the DHA cost report, Miller stated that $1,100 each was paid to Boston Baptist Church and to Greater New Salem Baptist Church. However, in fact, only $600 was paid in rent to Boston Baptist Church; the remainder was paid directly to Rev. Mays as compensation for referring parishioners to DHA. Rev. Walker of Greater New Salem Baptist Church was paid the entire $1,100 as compensation for referring parishioners to DHA.

Finally, Tom Henry directed the HHCAs to submit claims to Medicaid for co-insurance payments for Medicare patients. Medicaid will pay co-insurance only on Medicare patients for the purchase of medical equipment and supplies. Tom Henry altered the forms to claim $1,000,000, when only approximately $12,000 of the claims were legitimate.

At the appellants' sentencing hearing, the HHS testified to the amount of money appellants' owed according to the cost reports for the years in question, the amount of

profit paid to related parties and charged to Medicare, the amount fraudulently recovered for personal expenses, and the amount incorrectly billed to Medicaid. James Henry was sentenced to 12 months incarceration, fined $3,000 and ordered to pay $42,010 in restitution. David Jones was sentenced to 51 months incarceration and restitution in the amount of $2,460,950.02. Tom Henry was sentenced to imprisonment for 57 months, restitution of $4,464,697.25 and forfeiture to the United States of $191,202.80.

II.

The appellants raise several issues on appeal. Each are addressed seriatim below.

A.

Tom Henry contends that the district court lacked subject matter jurisdiction over the charge that appellants' failed to disclose transactions with "related parties," in violation of 18 U.S.C. §§ 1001 AND 2. He argues that a determination of whether a provider has acquired goods or services from a related party is to first be reviewed by the administrative Provider Reimbursement Review Board (PRRB) of HHS.

Title 18 U.S.C. § 3231 vests federal district courts with jurisdiction over offenses against the laws of the United States. The defendants were charged with making false statements to the United States government. The district court therefore has jurisdiction to hear this case.

The Provider Reimbursement Review Board is an administrative resolution process for the resolution of civil claims. As the First Circuit noted in *United States v. Alemany Rivera*, 781 F.2d 229 (1st Cir. 1985), *cert. denied*,

475 U.S. 1086 (1985), the district court's assumption of criminal jurisdiction did not usurp the Provider Reimbursement Review Board's civil jurisdiction. *Id.* at 233. Because the HHS's primary jurisdiction for reimbursement disputes lies solely in the civil arena, the federal question jurisdiction of the district court in federal criminal cases is unaffected by the Medicare Act. Therefore, because defendants were charged with criminal offenses against the United States, the district court exercised proper jurisdiction over the prosecution of federal criminal statutes.

On appeal, David Jones contends for the first time that the government failed to prove he was the "David Jones" named in the indictment. Jones argues that the government failed to prove the identification element of its case. The identity of David Jones was not challenged during the trial, and no motion for acquittal on the failure to identify was made at the close of trial. Therefore, the defendant is precluded from raising this issue before this Court for the first time. *See Rebel Motor Freight, Inc. v. I.C.C.*, 971 F.2d 1288 (6th Cir. 1992). In addition, the silence of the witnesses who testified regarding David Jones' conduct (as well as the conduct of Tom and James Henry) is circumstantial evidence of identity, as these witnesses were well acquainted with David Jones, and if a different David Jones were being tried, such witnesses would no doubt have questioned his presence in the courtroom. *United States v. Fenster*, 449 F.Supp. 435, 442 (E.D.Mich. 1978).

C.

Next, the appellants claim that the district court's jury instruction on the false statement counts failed to ensure jury unanimity. The appellants were charged with making false writings containing false statements. The trial court gave the

following instruction on the requirement of a unanimous verdict:

> In order to return a verdict, it is necessary that each Juror agree thereto. In other words, your verdict must be unanimous.

During its deliberations, the jury asked the following:

> In Count Fourteen, where it reads "he then and there well knew all costs listed on the cost [report] were not reimbursable' does 'all' mean the total amount or part of the $370,590?

At this point, the appellants filed proposed instructions on unanimity regarding related parties and reimbursable costs. The court denied the request, and the appellants challenge that denial on appeal.

In this case, the jury unanimously found beyond a reasonable doubt that the defendants committed acts that caused false writings to be submitted to an agency of the United States. It does not matter whether the defendants "made" the false documents knowing that they would be passed on to the government or if they actually "used" the documents by physically passing them on to the government.

In reviewing jury instructions, this Court must examine the entire charge "to determine whether [the instructions] adequately inform the jury of the relevant considerations and provide a basis in law for aiding the jury in reaching its decision." *United States v. Montgomery*, 980 F.2d 388, 392 (6th Cir. 1992). Challenges to the trial judge's language are reversible only for an abuse of

discretion. *United States v. Busacca*, 863 F.2d 433, 435 (6th Cir. 1988), *cert. denied*,j 490 U.S. 1005 (1989).

In *United States v. Sanderson*, this Court held that the test for specific unanimity instructions is "a common-sense determination of a subject statute's application and purpose in light of traditional notions of due process and fundamental fairness." 966 F.2d 184, 188 (6th Cir. 1992). Applying the *Sanderson* test to the present issue, the intent of § 1001 is clear. The purpose of § 1001 is to punish those who cause false statements to be submitted to a government agency. "Make" or "use" are alternative means of satisfying this purpose.

Therefore, because the jury charge on this matter fully comported with traditional notions of fundamental fairness and due process, we find no error in the district court's instruction.

D.

David Jones challenges the sufficiency of the evidence to convict him of obstructing a federal audit, in violation of 18 U.S.C. §§ 1516 and 2. Jones argues that the government failed to prove that the HHCAs received in excess of $100,000 a year from the United States.

In order to determine whether the evidence was sufficient to support Jones' conviction, this Court must sustain the determination of the jury if it is supported by substantial and competent evidence. *United States v. Tilton*, 714 F.2d 642, 645 (6th Cir. 1983). This Court must determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, viewing the evidence in a light most favorable to the

government. *United States v. Sanchez*, 928 F.2d 1450, 1457 (6th Cir. 1991).

At trial, the evidence established by the audits and other records revealed that the nursing homes involved received at least $100,000 a year. The evidence also established that Jones ordered the preparation of the cost reports that were sent to Medicare and attempted to cover up false cost entries by ordering an employee to prepare a schedule of bonuses called Merit Pay Schedules to show that the bonuses had been liquidated within a year of issuance. In addition, Jones gave altered checks to the auditors. In this case, it is clear that a reasonable jury could have found David Jones guilty of obstructing a federal audit.

E.

Appellants Tom Henry and David Jones argue that the district court erred by not allowing expert witness Gary Bowers to critique or comment on the testimony of other witnesses or to give legal opinions. The trial judge had broad discretion regarding the admission of expert evidence and evidentiary rulings should not be disturbed unless they are manifestly erroneous. *Mannino v. Intern. Mfg. Co.*, 650 F.2d 846, 849 (6th Cir. 1981). In this case, the court did not abuse its discretion. Bowers was allowed to attend the trial and testify on a number of issues, and was properly precluded from critiquing or commenting on the testimony of other witnesses. More importantly, this issue was not preserved for appeal. Under Federal Rule of Evidence 103, no error may be predicated on a ruling which excludes evidence unless the substance of the evidence was made known to the court by offer or was apparent from the context in which the questions were asked. Neither occured in this case.

F.

Tom Henry contends that Counts Four and Five of the superseding indictment must be dismissed because they are multiplicities. In Counts Four and Five, Tom Henry is charged with using two separate schemes to violate 18 U.S.C. § 666, Theft from a Program Receiving Federal Funds. Although the time during which the violations occurred was overlapping, in one scheme Tom Henry used funds embezzled from THS, an organization receiving federal funds, to purchase real estate, and
in another scheme he used the funds to pay his personal expenses. The separate nature of these two acts properly constitute a basis to charge them both as separate offenses.

G.

Tom Henry next contends that the trial court lacked subject matter jurisdiction over Counts Four and Five. He claims that THS did not receive benefits from a federal program as contemplated by that statute. In fact, Medicare funds were disbursed through an intermediary to THS pursuant to a contract with HHS to provide medical care to eligible persons. According to the legislative history of § 666, Congress intended to protect federal programs which result from "a specific statutory scheme authorizing the Federal assistance in order to promote or achieve certain policy objectives." S.Rep. No. 225, 98th Cong., 2d Sess. 369, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3510-11. Therefore, the district court properly exercised its jurisdiction because THS clearly received medicare funds.

Tom Henry also argues that the evidence was insufficient to convict him of Counts Four and Five, Theft from a Program Receiving Federal Funds. He contends that

the related money laundering and forfeiture charges contained in Counts Six through Thirteen, and Thirty-Six, must therefore also fail for lack of sufficient evidence. Specifically, Tom Henry argues that the government was required and failed to prove that the money he took from the THS account and converted to his personal use were actually federal funds. He asserts he was entitled to the money he took from THS as compensation for the services he rendered to THS or as repayment of loans. However, as the court stated in *United States v. Westmoreland*, 841 F.2d 572, 577 (5th Cir.), *cert. denied*, 488 U.S. 820 (1988) the government is not required to trace the flow of federal money under 18 U.S.C. § 666. Therefore, Henry's argument fails.

Tom Henry also argues that he lacked criminal intent with respect to Counts Four and Five, because he held good faith belief that he was entitled to the funds in question. The elements of knowledge and intent are questions of fact for the jury. *United States v. Johnson*, 767 F.2d 673 (10 Cir. 1985).

The government's evidence established that from 1987 to 1989, Tom Henry received $264,181.45 from THS in excess of sums legitimately due him. The evidence demonstrated that he used this money for personal expenses, such as credit card expenses, furriers and vacations. The jury properly concluded that he intended to misapply the THS money for personal expenses. Therefore, this Court upholds the convictions on Counts Four and Five, as well as the related charged in Counts Six through Thirteen and Thirty-six.

H.

Next, Tom Henry contends that the district court violated his right to due process by refusing to bifurcate the

jury deliberations on the forfeiture count from the remainder of the case. The forfeiture count required proof by a preponderance of the evidence, while the remainder of the charges required proof beyond a reasonable doubt.

The decision to bifurcate jury deliberations of guilt and forfeiture is squarely in the discretion of the trial court judge. *United States v. Smith*, 966 F.2d 1045 (6th Cir. 1992). In this case, the trial court judge repeatedly emphasized to the jury, on both its jury instructions and on the verdict sheet, that the issues of guilt and forfeiture were to be determined separately. Therefore, there is no evidence that the court abused its discretion.

I.

James Henry contends that the district court erred in denying his motion for a bill of particulars. James Henry argues that he was surprised by evidence of $29,010.00 in management and contract checks for Tom Henry which were included on the 1988 Medicare cost report for SCHAA.

The decision to grant or deny a motion for a bill of particulars lies within the sound discretion of the trial court. *United States v. Salisbury*. 983 F.2d 1369, 1375 (6th Cir. 1993). For the denial of a motion to be overturned, a defendant must show not only that the district court abused its discretion, but also that the defendant suffered surprise or other prejudice at trial. *Id.*, at 1375.

James Henry's contention of surprise is without merit. James Henry's counsel admitted that he learned of his client's participation in the cashing of the checks the week before the government discovered the information. Accordingly, James Henry has not shown either an abuse of

discretion nor actual surprise. Therefore, the district court's denial of the motion was proper.

J.

In addition, James Henry argues that the district court erred in allowing testimony regarding his company-provided automobile, his joint ownership of the building in which SCHHA is located and the writing and cashing of the management and contract checks to Tom Henry. James Henry contends that the district court violated Fed. R. Evid. 401 and 403 in allowing this testimony.

The decision whether to admit evidence is under the discretion of the district court. *United States v. Brady*, 595 F.2d 359, 361 (6th Cir.), *cert. denied*, 444 U.S. 862 (1979). In reviewing the decision, the evidence is viewed "in the light most favorable to its proponent." Fed. R. Evid. 401 states that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." Fed. R. Evid. 403 limits the introduction of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

There is no indication that the evidence, which was clearly relevant, was in any way unfairly prejudicial. Therefore, the district court properly admitted the evidence.

K.

Next, James Henry argues that the evidence presented was insufficient to convict him of Making False Statements

in violation of 18 U.S.C. §§ 1001 and 2. As stated above, this Court must sustain the determination of the jury if it is supported by substantial and competent evidence. *United States v. Tilton*, 714 F.2d 642, 645 (6th Cir. 1983).

The evidence is this case established that James Henry aided and abetted Tom Henry in knowingly and willfully making a material false statement on the 1988 SCHHA Medicare cost report. For example, although James Henry did not sign the cost report, he was extensively involved in the management of SCHHA. He maintained control of SCHHA's checkbook, accounts receivable and accounts payable. James Henry ordered that improper checks be written to Tom Henry. This evidence, along with other incidents, provided a sufficient basis for the jury's determination of James Henry's guilt.

L.

David Jones argues that the district court incorrectly calculated the amount of money stolen from Medicare funds in determining his offense level at sentencing. Factual findings of the sentencing court are upheld unless clearly erroneous. *United States v. Muhammad*, 948 F.2d 1449, 1455 (6th Cir. 1991), *cert. denied*, 112 S.Ct. 1239 (1922).

Jones was found guilty of Making False Statements on Medicare cost reports in violation of 18 U.S.C. § 1001. In sentencing for § 1001 violations, the court calculates the sentence pursuant to U.S.S.G. § 2F1.1, which provides for a base offense level of six (6) and allows for increases based upon the amount of property stolen. In this case, the district court found that $3,669,331.39 was stolen, and increased David Jones' offense level by 13 points.

David Jones failed to present any evidence to establish that the government's calculation was inaccurate or "outside the universe of acceptable computations." *United States v. Tardiff*, 969 F.2d at 1288 (applying Section 2F1.1 to a conviction for mail fraud). The district court found that the government's calculations were correct, no evidence was presented to prove that this finding was clearly erroneous.

Next, James Henry contends that his offense level should not have been increased by two levels and that he should not have been required to pay restitution in the amount of $29,510,00. At sentencing, the district court added four points to James Henry's base offense level and ordered him to pay total restitution of $42,010.00.

In sentencing, the district court must consider relevant conduct in determining the appropriate guideline range, according to section 1B1.3 of the Sentencing Guidelines. The district court's determination of relevant conduct will not be disturbed unless clearly erroneous. *United States v. West*, 948 F.2d 1042, 1045 (6th Cir. 1991), *cert. denied*, 112 S.Ct. 1209 (1992). This Circuit has repeatedly held that uncharged relevant conduct may be considered by the sentencing court in determining the guideline range. *Id.* at 1045; *see also United States v. Wilson*, 954 F.2d 374, 377 (6th Cir. 1992); *United States v. Kappes*, 936 F.2d 227, 229 (6th Cir. 1991). Conduct which is part of the same course of a common scheme may be included if there is some "indicium of reliability beyond mere allegation." *United States v. Smith*, 887 F.2d 104, 108 (6th Cir. 1989).

In determining defendant's offense level, the court included all amounts which were falsely claimed as reimbursable by Medicare on the SCHHA filing. James Henry was in charge of SCHHA, as shown by the fact that he maintained the checkbooks and signed the checks. His

participation in the scheme to funnel $29,510.00 to his brother was clear, and properly included as relevant conduct by the district court.

James Henry also argues that since the $29,510.00 of "consulting fees" were not relevant conduct, that amount is not part of the underlying offense of conviction and therefore restitution may not properly be ordered. The government's evidence showed that the $29,510.00 consisted of SCHHA checks written to Tom Henry and cashed at the direction of James Henry. These fees were clearly a part of the "offense of conviction" and the district court correctly ordered James Henry to pay restitution for this amount.

N.

James Henry also contends that the district court incorrectly enhanced his sentence two levels for "more than minimal planning," under U.S.S.G. § 2F1.1(b)(2). This finding will be reversed only if clearly erroneous. *United States v. Muhammad*, 948 F.2d at 1455. The evidence established that James Henry engaged in repeated acts to accomplish and conceal the making of false statements on a Medicare cost report. Based on this evidence, we find no error in the district court's determination that there was more than minimal planning on the part of James Henry.

O.

Next, James Henry argues that the district court erred in determining that he was not a minor or minimal participant in the scheme, and therefore not entitled to a four level reduction under U.S.S.G. § 3B1.2(a). Again, the evidence showed that James Henry made false statements on at least two cost reports for SCHHA, signed fake promissory notes to support non-existent bonuses, and received cash

from checks written to Tom Henry for bogus consulting fees. Accordingly, we find no error in the district court's determination that James Henry was not a minor participant in this criminal activity.

P.

David Jones also contends that the trial court erred by enhancing his sentence three levels for a leadership role, rather than only by two levels for "more than minimal planning." Contrary to Jones' assertions, the trial court did not engage in double counting, because it did not apply enhancements for both having a leadership role and for engaging in more than minimal planning. Instead, the court simply —applied the enhancement for a leadership role. Accordingly, we find no error in the district court's decision to increase Jones' guideline level for his role in the offense.

Q.

Finally, all three appellants argue that the district court erred in imposing restitution for losses for which the victim has or will receive compensation. They argue that, based upon audit adjustment factors, the correct amounts are much lower. However, according to the evidence, the amounts of restitution determined by the district court are proper, and the appellants have been credited with all amounts recovered.

III.

Therefore, we **AFFIRM** the appellants' convictions and sentences.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

UNITED STATES OF AMERICA

V.

David Jones
(Name of Defendant)

JUDGMENT IN A CRIMINAL

(For Offenses Committed On or After November 1, 1987)

Case Number: 3:91-00095-03
Peter Strianse, Edward McDonough, Nina Gwin
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☒ was found guilty on count(s) 1, 3, 18, 21, 24, 29, 32, 33 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & & Section	*Nature of Offense*	*Date Offense Concluded*	*Count Number(s)*
18:371	Conspiracy to Defraud U.S.	12/90	1 & 3
18:1001 AND (2)	False Statements and Aiding & Abetting	8/90	18,21, 24, & 29

Title & Section	*Nature of Offense*	*Date Offense Concluded*	*Count Number(s)*
18:1516 and 2	Obstructing Federal Audit	6/90	32 & 33

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) 35 and is discharged as to such count(s).

☒ Count(s) of Original Indictment ( )(are) dismissed on motion of the United States.

☒ It is ordered that the defendant shall pay a special assessment of $ 400.00 , for count(s) , which shall be due ☒ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No. 410-19-0842
Defendant's Date of Birth May 23, 1958
Defendant's Mailing Address:
200 Horn Spring Road
Lebanon, Tn. 37087

November 23, 1992
Date of Imposition of Sentence

/s/ John T. Nixon
Signature of Judicial Officer

JOHN T. NIXON, CHIEF JUDGE
Name & Title of Judicial Officer

Defendant's Residence Address:

_____

_____

This document was entered on the docket in compliance with Rule 55, FRCrimP, on

12-1-92
Date

By: /s/ illegible

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ***FIFTY-ONE (51) MONTHS.***

The court makes the following recommendations to the Bureau of Prisons:

THAT THE DEFENDANT BE INCARCERATED AT THE FEDERAL CORRECTIONAL INSTITUTION IN MILLINGTON, TENNESSEE.

o The defendant is remanded to the custody of the United States marshal.

x The defendant shall surrender to the United States marshal for this district.

- x at **12:00 NOON ON FRIDAY, NOVEMBER 27, 1992.**
- o as notified by the United States marshal.

o The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

- o before 2 p.m. on .
- o as notified by the United States marshal.
- o as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on to
, with a certified copy of this judgment.

_____

United States Marshal

By _____

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of ***THREE (3) YEARS.***

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

x The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

o The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

x The defendant shall not possess a firearm or destructive device.

Special Conditions:

THE DEFENDANT SHALL MAKE FULL RESTITUTION IN THE AMOUNT OF $2,460,950.02, BEGINNING IMMEDIATELY.
THE DEFENDANT IS PROHIBITED FROM INCURRING NEW CREDIT CHARGES OR OPENING ADDITIONAL

LINES OF CREDIT WITHOUT THE APPROVAL OF THE U.S. PROBATION OFFICE.
THE DEFENDANT SHALL PROVIDE THE U.S. PROBATION OFFICE ACCESS TO ANY REQUESTED FINANCIAL INFORMATION.
THE DEFENDANT IS PROHIBITED FROM EMPLOYMENT WITH A HEALTH CARE COMPANY WHICH RECEIVES FUNDS FROM MEDICARE OR MEDICAID.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state, or local crime. In addition:
1) The defendant shall not leave the judicial district without the permission of the court or probation officer;
2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) The defendant shall support his or her dependents and meet other family responsibilities;
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) The defendant shall notify the probation officer within 72 hours of any change in residence or employment.
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation or any contraband observed in plain view by the probation officer;

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a low enforcement without the permission of the court;

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

RESTITUTION AND FORFEITURE

RESTITUTION

x The defendant shall make restitution to the following person in the following amounts:

Name of Payee	Amount of Restitution
U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES HCFA **P. O. BOX 17255** **BALTIMORE, MARYLAND 21203-7255**	$2,460,950.02

Payments of restitution are to be made to:

o the United States Attorney for transfer to the payee(s).
x the payee(s).

Restitution shall be paid:

x in full immediately.
o in full not later than .
o in equal monthly installments over a period of months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.
o in installments according to the following schedule of payments:

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

FORFEITURE

o The defendant is ordered to forfeit the following property to the United States:

Defendant: David Jones **Judgment-Page** ___**of**____
Case Number: 3-91-00095

STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application in the presentation report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level ____ **24** ___

Criminal History Category: ___ **I** ___

Imprisonment Range: __ **51** __ **to** __ **63** __ **months**

Supervised Release Range: __**2**__ to __**3**__ **years**

Fine Range: **$ 10 000 to $ 100 000**

☐ Fine is waived or is below the guideline range, because of the defendant's inability to pay

Restitution: $ 2 460 950.02

☐ Full restitution is not ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): Seriousness of offense. Deterrence to defendant & general deterrence.

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following reason(s)

Case No. 92-6650

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT **FILED**

ORDER JAN 7, 1994
LEONARD GREEN, CLERK

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

DAVID W. JONES
Defendant - Appellant

BEFORE: KEITH and KENNEDY, Circuit Judges; JORDAN, District Judge.*

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Jr.
Leonard Green, Clerk

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The Honorable Leon Jordon District Judge for the Eastern District of Tennessee, sitting by designation.